BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaint and request for emergency relief against Verizon Florida LLC for anticompetitive behavior in violation of Sections 364.01(4), 364.3381, and 364.10, F.S., and for failure to facilitate transfer of customers' numbers to Bright House Networks Information Services (Florida) LLC, and its affiliate, Bright House Networks, LLC	Docket No. 070691-TP Filed: December 13, 2007

BRIGHT HOUSE'S OPPOSITION TO THE MOTION OF VERIZON FLORIDA, LLC TO DISMISS COMPLAINT OR, IN THE ALTERNATIVE, STAY PROCEEDINGS

Bright House Networks Information Services (Florida), LLC, and its affiliate, Bright House Networks, LLC (together, "Bright House"), through their attorneys, respectfully file this response to Verizon Florida LLC's Motion to Dismiss Complaint or, in the Alternative, Stay Proceedings ("Verizon Motion") filed on December 6, 2007.

Verizon's motion should be rejected. It is simply a ploy to try to keep the Commission from looking at the illegal marketing practices Verizon is now using to try to retain its "plain old telephone service" customers. Verizon knows that its conduct violates the Commission's long-standing rulings on this topic.[1] In fact, those Commission rulings prudently reflect common business sense: Where one provider (here, Verizon) learns that a customer is switching to another (here, Bright House), not from its own independent marketing efforts or entrepreneurship, but because Bright House ***has*** to tell Verizon's wholesale side that the customer is leaving, it is unfair and anticompetitive to let Verizon use that advance notice to try to keep the customer.

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[1] *See Petition for Expedited Review and cancellation of BellSouth Telecommunications, Inc.'s Key Customer promotional tariffs and for investigation of BellSouth's promotional pricing and marketing practices, by Florida Digital Network, Inc.,* Docket Nos. 020119-TP *et al.,* Order No. PSC-03-0726-FOF-TP (June 19, 2003) ("Order No. PSC-03-0726-FOF-TP"); *Complaint by Supra Telecommunications and Information Systems, Inc. against BellSouth Telecommunications, Inc. regarding BellSouth's alleged use of carrier-to-carrier information,* Docket No. 030349-TP, Order No. PSC-03-1392-FOF-TP (December 11, 2003) ("Order No. PSC-03-1392-FOF-TP").

The Commission's approval of BellSouth's 10-day "quiet period" – which bans both retention and win-back marketing from the time of the port request until 10 days after its execution – is based on the simple and accurate recognition that it is unfair and anticompetitive to let the losing carrier take advantage of advance knowledge of customer changes that it gains from the winning carrier. Keeping a customer under those circumstances is not fair or reasonable competition. It's just cheating. Like a card shark playing poker with a marked deck, Verizon's supposedly pro-competitive retention marketing is really just a way to exploit its unfairly acquired advance knowledge of Bright House's competitive successes. It's easy to know how to bet when you can see the other guy's cards.

Legally, all Bright House wants is for the Commission's existing interpretation of Florida law – that is, its approval of the 10-day waiting period – to be applied to Verizon as well as to AT&T (formerly BellSouth). Far from being properly subject to stay or dismissal, Bright House's complaint is so plainly meritorious that the Commission should promptly grant Bright House's request for emergency relief.

Verizon raises various arguments in support of dismissing or staying Bright House's complaint. None has any merit whatsoever. We address them sequentially below.

1. Bright House Has Plainly Stated A Claim For Relief.

First, Verizon says that Bright House has failed to state a claim on which relief can be granted. Verizon Motion at 8-17. This is specious. We have alleged that Verizon takes information that it learns entirely from its wholesale-side interactions with Bright House and uses it to support its own retail marketing efforts. Verizon admits this, acknowledging that it receives the advance notice of customer disconnection ***from Bright House,*** not from Verizon's own efforts. *See* Verizon Motion at 5 ("Verizon receives a local service request ('LSR') for local number porting

('LNP') from Bright House…"). Verizon also admit that it then engages in retention marketing based on that advance notice. *See id.* (Verizon "provides additional information to the customer" "in response to" the customer loss notification that arises from Bright House's submission of the LSR). Moreover, this marketing occurs at precisely the time when a customer is most vulnerable to being lured back to Verizon – after they have agreed to switch, but before they have had the chance to actually experience the versatility, quality and usefulness of Bright House's services. Bright House also alleged, correctly, that Verizon's conduct falls directly within the scope of the two prior Commission orders we cited on this topic. And, we have explained how these facts are more than sufficient to conclude that Verizon is acting anticompetitively (in violation of Florida Statutes § 364.01(4)(g)); that Verizon is favoring itself unfairly (in violation of Florida Statutes § 364.10(1)); and that Verizon is failing to facilitate the porting of numbers (in violation of Florida Administrative Code § 25-4.082). To say that Bright House has not stated a claim in these circumstances is utterly baseless.

2. Verizon's Word Games Cannot Convert Carrier-to-Carrier Wholesale Functions Into "Retail" Activities.

Verizon's first "defense" to this plainly anticompetitive conduct is to play word games. Verizon admits that it gets the advance knowledge of customer disconnects not from its own retail efforts, but instead from information that Bright House submits to Verizon. But somehow the fact that the information is received on Verizon's wholesale side, by means of a wholesale carrier-to-carrier ordering document (the LSR) means nothing to Verizon. Since the customer is buying a "retail" service from Verizon (which is true by definition – what else would an end-user residence customer buy?), Verizon calls the disconnect order a "retail disconnect order" and a "retail loss notification." Verizon Motion at 5. Verizon acknowledges, as it must, that Verizon and Bright House have to coordinate, behind the scenes, to "ensure that the customer's retail service is

discontinued at the appropriate time, that the customer experiences no loss of dial tone or missed calls, and that the billing by the old and new local service providers does not overlap." *Id.* By any normal interpretation of the English language, these behind-the-scenes, carrier-to-carrier coordinated activities would be viewed as "wholesale"-level activities. But to Verizon, since it is the customer's retail service that is being terminated, somehow every activity related to the service termination is magically converted into a "retail" activity itself. This refusal to use words in their normal, natural sense obviously does not support Verizon's position here.

3. Two Wrongs Don't Make A Right.

Verizon also attempts to justify its illegal behavior by claiming that it would not mind if Bright House did the same thing back to Verizon. *See* Verizon Motion at 7. We all learned the answer to this argument back in grade school: two wrongs don't make a right. More pragmatically, Verizon knows full well that in any given month it loses more customers to Bright House than Bright House loses to Verizon. This means that if Verizon can illegally slow down the rate at which customers leave Verizon, it will come out ahead even if Bright House were to turn around and – equally illegally – slow down the (already much lower) rate at which customers leave Bright House for Verizon.

4. Florida Law Does Not Authorize Retention Marketing.

Verizon claims that Florida Statutes § 364.051 "specifically permits Verizon to engage in retention marketing." Verizon Motion at 8. But that is a plain misreading of the statute. Section 364.051 relates to price-based regulation, rather than earnings-based regulation, of large Florida telephone companies. In dealing with prices for non-basic services, Section 364.051(5) states that "price regulation of non-basic services shall consist of the following," and then contains a number of provisions. One of those provisions – subsection 364.051(5)(a)(2) – addresses the question of

whether a regulated carrier is allowed to lower its rates for non-basic services to match the rates offered by competitors. As the material quoted by Verizon shows, Florida law allows a regulated carrier, such as Verizon, to lower its rates to match those of a competitor.

But this statute does not support Verizon at all.

First, Bright House is not complaining about Verizon's ***pricing.*** We are complaining about Verizon's ***marketing practices***, *i.e.*, the time and manner in which Verizon communicates its prices to consumers. These are not at all the same thing. Clearly, Verizon could use a lawful marketing practice, such as taking out an ad in the newspaper, to provide information about a price that was completely unlawful (say, a monthly fee of $200 for regulated basic local service). But equally clearly, Verizon can use an unlawful marketing practice – such as relying on advance knowledge of customer defections obtained from its wholesale side – to provide information about a lawful price. ***That*** is happening here, and ***that*** is what Bright House is complaining about.

In this regard, the Commission's own precedent makes clear that Section 364.051 does not relate to marketing practices, as opposed to prices. In one of the cases cited above,[2] one of the principle issues was whether the prices in BellSouth's promotional tariffs were lawful. In addressing that issue, the Commission repeatedly cited to Section 364.051 in the first thirty-six pages of the order – indeed, in many cases to the specific subsection on which Verizon relies here.[3] But when the Commission was discussing BellSouth's ***marketing practices*** a few pages later – and specifically approved BellSouth's 10-day "quiet period" – the Commission made no reference to Section 364.051 at all. Surely if the Commission, or BellSouth, or any other party to that case, had thought that Section 364.051 had anything to do with marketing practices, as opposed to prices,

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[2] Order No. PSC-03-0726-FOF-TP.

[3] *See id.* at 9-10, 12-13, 16-17, 20-23, 28-30, 34-36 (citing, on each page, Florida Statutes § 364.051).

there would be some evidence of that view in the Commission's specific discussion of marketing practices. The absence of any such citation speaks volumes about the irrelevance of that section to the issues raised in Bright House's complaint here.

Second, the section of the statute that Verizon relies upon relates to pricing of non-basic services. But while Verizon's unlawful marketing efforts may embrace some non-basic services, at bottom Verizon is using its advance knowledge of customer departures to try to keep them on as customer's of Verizon's ***basic*** services. So even if one could construe the statute as relating to marketing practices rather than pricing – and, again, the statute cannot fairly be read that way – it would still not apply to Verizon's conduct in this case.

Finally, while, as noted above, Section 364.051 does not embrace marketing practices, if it did it would not help Verizon. That is because the statute also makes clear that the Commission retains the overarching obligation to protect the competitive process from abuses such as those perpetrated by Verizon here. After granting regulated carriers substantial pricing flexibility to meet competitors' offers, the statute continues:

> However, the local exchange telecommunications company ***shall not engage in any anticompetitive act or practice,*** nor unreasonably discriminate among similarly situated customers.

Florida Statutes § 364.051(5)(a)(2) (emphasis added). And, anticipating that even the seemingly unobjectionable ability to set prices to meet competition might create problems, the legislature provided, in the very next subsection of the law, a specific directive that:

> [t]he commission shall have continuing regulatory oversight of nonbasic services for purposes of … preventing cross-subsidization of nonbasic services with revenues from basic services, and ***ensuring that all providers are treated fairly in the telecommunications market.***

Florida Statutes § 364.051(5)(b) (emphasis added). So, if we assume that Section 364.051 relates to marketing practices at all, it means that, with respect to marketing practices, the Commission

must ensure that "all providers are treated fairly." Bright House submits that it is unfair in the extreme to allow Verizon to exploit its wholesale-side advance knowledge of which customers are leaving Verizon – which Bright House has no choice under current industry standards and conditions but to provide – to try to prevent those customers from leaving.

5. The Commission Is Not Limited To Enforcing Federal Restrictions.

Verizon makes a radical – and radically wrong – claim about the scope of the Commission's power to enforce Florida law. Verizon says, basically, that this Commission's only power to regulate Verizon's marketing practices in connection with its intrastate, "plain old" local services, is to prevent Verizon from doing things that are prohibited, at the federal level, by Section 222 of the Communications Act. *See* Verizon Motion at 9-10. Specifically, Verizon says that "if federal law permits the challenged conduct, the Commission must deny the claim." *Id.* at 10.[4]

This analysis is plainly wrong. Under Florida law this Commission has jurisdiction over Verizon's marketing practices as they relate to Verizon's intrastate services. That authority does not derive in any way from federal law. Now, one can imagine a situation in which federal law expressly permits some practice while state law expressly forbids it. In that case – assuming the federal law covered intrastate services – there would be a conflict between state and federal law that would probably preclude enforcement of the state law.

[4] Verizon notes (correctly) that Bright House is not pursuing claims under federal law in this case. Verizon Motion at 9. It then proceeds, somewhat bizarrely, with an explanation of why this Commission cannot enforce federal law – which Bright House is not asking the Commission to do. *Id.* at 9-10. (This Verizon claim is not strictly true – *see, e.g.*, 47 U.S.C. § 252(e) – but can be accepted for purposes of this argument.) But Verizon then says that this Commission must, in effect, enforce ***only*** the requirements and restrictions of federal law in deciding this case. *Id.* So in Verizon's view, apparently, the Commission is simultaneously forbidden from enforcing federal law, but is also limited to enforcing federal law.

But here we have a totally different situation: state law prohibits all anticompetitive and unfair carrier practices, including any and all marketing practices that are anticompetitive and unfair. Federal law, on the other hand – at least Section 222 of the Communications Act – forbids certain specific unfair and anticompetitive marketing practices. Bright House believes that the specific Verizon practices at issue in this case violate both state and federal law.[5] But if Verizon's particular anticompetitive practices somehow fell outside the prohibitions of Section 222, that wouldn't mean that this Commission can't enforce Florida law to ban them. It would just mean that Florida law prohibits some practices that are not also expressly prohibited by federal law. This would not be a "conflict" between state and federal law. It would just be the fairly common situation of state law being a bit more strict than federal law.[6]

Verizon's radical legal proposition is that, as long as federal law does not expressly prohibit some practice, Florida is not allowed to prohibit it either. That is not remotely accurate as a statement of what is required to establish federal preemption of state authority to enforce state law. We submit that Verizon knows perfectly well that it could not sustain any such preemption claim. This is shown by the fact that Verizon never actually uses the word "preemption" and cites no cases or statutory authority in support of its views on the role of federal law here. In these circumstances

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[5] The FCC stated plainly that "competition is harmed if ***any*** carrier uses carrier-to-carrier information … to trigger retention marketing campaigns, and [we] consequently prohibit such actions accordingly." *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, Order on Reconsideration and Petitions for Forbearance, 14 FCC Rcd 14409 (1999) at ¶ 76 (emphasis in original).

[6] In this regard, the difference between Florida law and Section 222 of the Communications Act is significant. Florida law (Florida Statutes §§ 364.01(4)(g), 364.01(4)(i), and 364.3381(3)) prohibits all anticompetitive conduct, including all anticompetitive conduct relating to marketing, while Section 222 of the federal law prohibits certain specific abusive, anticompetitive marketing practices. In the area of abusive marketing practices, therefore, Florida law is ***broader*** than federal law. It certainly outlaws what federal law outlaws, but it also outlaws ***more.***

the Commission can and should completely disregard Verizon's effort to emasculate the Commission's ability to enforce Florida law.

6. Verizon's Discussion of Federal CPNI Rules Is Both Wrong And Irrelevant.

Verizon devotes two pages of its brief (pages 11-12) to a completely irrelevant discussion of federal rules regarding "customer proprietary network information," or CPNI. This is somewhat baffling in that Bright House's complaint said nothing at all about CPNI.

The FCC's CPNI rules discussed by Verizon are irrelevant for two reasons. First, under federal law, CPNI is information relating to telephone services that "is made available to the carrier by the customer." 47 U.S.C. § 222(c)(A). The underlying problem in this case arises, however, because Verizon is misusing competitively sensitive information that "is made available to [Verizon]" by ***Bright House.*** So this case does not involve CPNI at all. Indeed, the fact that it is Bright House that is advising Verizon of pending customer disconnections is what makes the information in "proprietary information of, and relating to" Bright House for purposes of Section 222(a), and "proprietary information from" Bright House for purposes of Section 222(b).[7]

Second, Verizon's discussion confuses two very different situations: ***win-back*** marketing, where one carrier seeks to regain a customer who has already fully left for another carrier, and

[7] Without question, Bright House's customer list – which is what the information Verizon is taking advantage of really is – is competitively sensitive information, entitled to proprietary protection. *See, e.g., Fortune Personnel Agency of Ft. Lauderdale, Inc. v. Sun Tech, Inc. of South Florida,* 423 So.2d 545 (Fla. 4th DCA 1982) (valid customer lists and confidential business information are protected as trade secrets); *Grooms V. Distinctive Cabinet Designs,* 846 So.2d 652 (Fla. App. 2 Dist. 2003) (requiring disclosure of customer lists to competitor can irreparably damage business). Unfortunately, as noted above, the technical realities of the telephone business require the winning carrier to give advance notice to the losing carrier that a customer is about to leave. But that technical necessity does not make it fair, reasonable, or pro-competitive to allow the losing carrier to competitively exploit that information. To the contrary, ensuring a fair and reasonable competitive process requires that use of that information be forbidden, as the Commission and the FCC have both already recognized.

retention marketing, where one carrier seeks to prevent a customer from actually leaving in the first place. Federal law permits a carrier to engage in retention marketing if it obtains "independent" knowledge, through its own retail marketing efforts, that a customer is leaving. Federal law also permits win-back marketing – efforts to get a customer back, who has already left – and permits the use of CPNI in those efforts. But, again, this case does not involve CPNI, and does not involve win-back efforts. It involves carrier-to-carrier information that Verizon gets from Bright House, and it involves Verizon retention marketing efforts. Verizon's discussion of these points is totally irrelevant to this case.[8]

7. Verizon's Conduct Violates Federal Law.

As noted above, Bright House is not proceeding under federal law (Section 222 of the Communications Act); it is proceeding under state law (including Florida Statutes §§ 364.01(4)(g), 364.01(4)(i), and 364.3381(3)). Verizon nonetheless uses four pages to argue that its conduct does not violate federal law. Verizon Motion at 13-16.

In a nutshell, Verizon is flat wrong. As we noted in our Complaint, the FCC – acting under Sections 222(a) and 222(b) of the Communications Act – has clearly prohibited a carrier losing a customer from using advance notice of the customer change, obtained from the winning carrier, to

[8] In this part of the discussion, Verizon attempts to blur the distinction between its retail and its wholesale sides. *See* Verizon Motion at 12. We agree with Verizon that, where a retail customer calls up Verizon's retail service or marketing personnel and announces the customer's planned departure, Verizon is allowed to market to that customer in an effort to retain his or her business. *See* Verizon Motion at 12. But we totally disagree with Verizon's claim that the same rule applies when Bright House, having successfully won the customer, contacts Verizon's wholesale side in order to coordinate LNP and disconnection activities. *See id.* If there were some way for Bright House to take over a customer's service, including the customer's Verizon-assigned phone number, without involving or advising Verizon, we would. But at least under current industry practices, there isn't. The fact that Bright House is forced to deal with Verizon, on a carrier-to-carrier, wholesale level to coordinate the changeover from Verizon to Bright House means that this situation is not at all similar to the situation of a customer calling Verizon to disconnect service on his or her own initiative.

retention market to that customer. The FCC stated that "competition is harmed if ***any*** carrier uses carrier-to-carrier information, such as switch or PIC change orders, to trigger retention marketing campaigns, and [we] prohibit such actions accordingly."[9] Explaining further, the FCC stated:

> 77. The [FCC] previously determined that carrier change information is carrier proprietary information under section 222(b). In the *Slamming Order*, the Commission stated that pursuant to section 222(b), the carrier executing a change "is prohibited from using such information to attempt to change the subscriber's decision to switch to another carrier." Thus, ***where a carrier exploits advance notice of a customer change by virtue of its status as the underlying network-facilities or service provider to market to that customer, it does so in violation of section 222(b).*** We concede that in the short term this prohibition falls squarely on the shoulders of the BOCs and other ILECs as a practical matter. As competition grows, and the number of facilities-based local exchange providers increases, other entities will be restricted from this practice as well.
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> 78. We agree with SBC and Ameritech that section 222(b) is not violated if the carrier has independently learned from its retail operations that a customer is switching to another carrier; in that case, the carrier is free to use CPNI to persuade the customer to stay, consistent with the limitations set forth in the preceding section. We thus distinguish between the "wholesale" and the "retail" services of a carrier. If the information about a customer switch were to come through independent, retail means, then a carrier would be free to launch a "retention" campaign under the implied consent conferred by section 222(c)(1).

Id. at ¶¶ 77-78 (footnotes omitted, emphasis added). Verizon's attempt to avoid the plain meaning of these FCC pronouncement boils down to nothing more than word games. According to Verizon, it doesn't matter that it actually learns of a pending customer loss from Bright House, on the wholesale side of Verizon's operations. Because the disconnection request has been authorized by the customer, and because the service being disconnected is (necessarily) a "retail" service, that makes the whole situation a "retail" situation to which the federal bar on using carrier-to-carrier information just doesn't apply. While Bright House is not relying on the details of federal law in

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[9] *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, Order on Reconsideration and Petitions for Forbearance, 14 FCC Rcd 14409 (1999) at ¶ 76 (emphasis in original).

its Complaint, and while this Commission plainly is not bound by the details of federal law in enforcing Florida's own prohibitions on anticompetitive and unfair conduct, we submit that Verizon's argument is clearly wrong, and the Commission should have no hesitation in rejecting it.

8. Public Policy Does Not Support Verizon.

Verizon claims that public policy supports its unfair marketing efforts. Verizon Motion at 16-17. Its basic point is that consumers benefit from having the information about Verizon's services that its retention marketing efforts provide, so those efforts must, themselves, be deemed to be pro-competitive.

This is wrong for several reasons. First, nothing prevents Verizon from undertaking generally applicable marketing efforts – newspaper, TV, radio or Internet ads, bill-stuffers, etc. – to inform consumers of Verizon's offerings. So this isn't about consumer education and information. It's about Verizon trying to hold onto the specific customers who have just decided to leave Verizon for Bright House, based on Verizon's advance knowledge, gained from Bright House, that those customers are leaving.[10]

[10] The notion that this is particularly useful information to consumers is specious. Consumers can get that information from general Verizon marketing campaigns. As a matter of practical business reality, a consumer who has decided to switch to Bright House's service, but has not yet used that service, is an unfair target of retention marketing for at least two reasons. First, the consumer has not yet had the chance to experience the quality, versatility, and benefits of Bright House's services, so the consumer is not yet in a position to know from his or her own experience that Bright House really does offer quality, reliable service. That's why it's harder to win a customer back than to keep a customer from leaving, and ***that's*** why Verizon is so eager to engage in this illegal retention marketing scheme. Second, Verizon's retention marketing is unfair because, while Verizon has a three-day window (the normal LNP interval) to try to retain a customer, if Verizon's marketing succeeds, Bright House does not have any similar opportunity to prevent the customer from staying with Verizon just by retention marketing. Even if Bright House could immediately begin re-marketing a customer upon learning from Verizon (through an LNP "jeopardy" notice) that the customer was staying with Verizon, that would be re-marketing an existing Verizon customer, not convincing a customer about to leave an existing service provider to stay. Again, given that the customer has not yet switched to Bright House and has not yet (note continued)…

Second, the technical characteristics of telephone service – unlike normal competitive products and services – ***require*** coordination between the losing and winning provider in order to make the transition possible without disrupting service. If a consumer decides to start patronizing a new grocery store, neither the consumer nor the new grocery store have to tell the old grocery store that the consumer's business has shifted. If a consumer decides to shop for clothing at Target rather than Wal-Mart, neither the consumer nor Target has to tell Wal-Mart. If a consumer decides to buy books from Amazon.com rather than Barnes & Noble, neither the consumer nor Amazon.com has to tell Barnes & Noble about the change. It is only the required coordination between Bright House and Verizon that makes Verizon's unfair retention marketing efforts possible.

Because Verizon learns of pending losses from Bright House, and because Bright House has no choice but to tell Verizon in advance that the losses are coming, it is simply unfair to allow Verizon to use that advance knowledge of the pending disconnections to retention market to the departing customers. Letting Verizon take advantage of its advance knowledge is like forcing Bright House to play poker with a deck Verizon has marked, so that Verizon can know how to bet based on unfair access to information about what's in Bright House's hand. That wouldn't be a fair card game, and allowing Verizon to retention market based on customer names supplied by Bright House isn't fair competition.

…(note continued)
experienced Bright House's service, retention marketing will always be easier than win-back marketing – which is precisely why Verizon is willing to break the law to do it.

9. There is No Reason To Stay This Case.

Verizon suggests that this Commission should stay consideration of this case based on the idea that Bright House has brought "parallel claims" to the FCC. Verizon Motion at 17-18. This language seriously mischaracterizes where things stand at the FCC.

Obviously, Bright House thinks that Verizon is violating federal law, and is therefore entitled to file a complaint at the FCC (or in federal court) seeking damages from Verizon as compensation for those violations. *See* 47 U.S.C. §§ 206-08. But Bright House has not filed any such federal complaint.

What Bright House has done is invoke the authority of the FCC staff to attempt to mediate the dispute. Procedurally, at the FCC, the way that works is for Bright House to request that the staff consider whether Bright House's claims against Verizon would fit under a specific type of expedited proceeding. That request – again, that the FCC staff evaluate the suitability of the claims for expedited treatment – triggers the authority of the staff to try to mediate the dispute. *See* 47 C.F.R. § 1.730. As of the date of filing its complaint here, Bright House had indeed requested such mediation. As of today, the only scheduled mediation session has occurred, with no settlement as between Verizon and Bright House (though the mediation is confidential, this fact is obvious: if we had settled, we would be dropping this complaint).

The FCC staff has not said anything about whether it will recommend that Bright House's claims would be suitable for expedited treatment. Moreover, even if at some point it says that they are, that does not actually initiate any proceeding at the FCC. A proceeding at the FCC would only begin when and if Bright House files a complaint there, which it has not yet done. So Verizon is simply wrong to suggest that the activities at the FCC warrant any kind of stay or dismissal of this case.

Essentially, Verizon is trying to punish Bright House – and discourage this Commission from acting – simply because Bright House took advantage of a possibility of reaching a mediated, informal settlement of this dispute with the help of the FCC staff. Verizon's argument would be wrong even if those informal efforts had not yet taken place. Now that they have, with no settlement in place, Verizon's argument is completely specious.[11]

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For all of these reasons, Verizon's Motion is totally without merit, and should be rejected.

Respectfully submitted,

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[11] Note that because state and federal law are not identical in what they prohibit – as noted above, state law is broader than federal law – there is no reason to discourage parallel proceedings in any event. Moreover, as alluded to above, federal law contains an explicit ***damages*** remedy for violations of federal law – the FCC in particular, under Section 208 of the Communications Act, is permitted to award damages – whereas this Commission is not empowered to award damages. This difference in available remedies also counsels against staying or dismissing this proceeding even if a federal proceeding were to be commenced.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served via Electronic Mail, U.S. Mail First Class, or Hand Delivery this 13th day of December, 2007, to the persons listed below:

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